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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1654

CHESTER McKINNEY,
Petitioner,

v.

CITY OF BIRMINGHAM,
Respondent.

BRIEF AND ARGUMENT

Of Respondent City of Birmingham in Opposition to Petition for Writ of Certiorari to the Court of Appeals of Alabama

QUESTION PRESENTED

Whether the non-federal ground upon which the State Court's dismissal of these cases was based is adequate to support such dismissal without consideration of the federal question.

REASONS FOR DENIAL OF CERTIORARI

I

The Dismissal of These Cases by the Court of Criminal Appeals of Alabama Was Based Upon an Adequate Non-Federal Ground.

The petitioner raised as the record shows federal questions at the proper time which were considered by the lower court in rendering its convictions as indicated in the judgment entry in each case as printed in the petition for certiorari as Appendix A, Pages 1A-18A. Such convictions were appealed to the Court of Criminal Appeals of Alabama in due course after proper notice of appeal was given and the transcript of the records in the lower court being filed in the Court of Criminal Appeals of Alabama on October 6, 1971 in due time. Thereafter appellant's brief in each case was to be filed in that court under Rule 12, Rules of Supreme Court, Title 7, Code of Alabama, 1940, Recompiled 1958, as amended, which rules are applicable upon an appeal from the judgment on a trial de novo in the Circuit Court finding defendant guilty of a breach of a City ordinance. **Parks v. City of Montgomery**, 38 Ala. App. 681, 92 S.2d 683, and **Woods v. City of Tuscaloosa**, 43 Ala. App. 626, 198 S.2d 306. Rule 12 reads as follows:

> "Time for Filing Briefs and Number of Copies to Be Filed in Civil Cases.
> Counsel for appellant shall file his brief with the Clerk of this court within thirty days after the transcript of the record has been filed in this court. Upon failure to so file, the appeal shall be dismissed or the case affirmed, as the case may be. Counsel for appellee shall file his brief with the Clerk of this court within twenty days after service upon him of appel-

lant's brief. Counsel for appellant may within ten days after service upon him of appellee's brief file a reply brief thereto, but such reply brief shall be limited to answering the matters contained in appellee's brief and shall not set up any new matter not in answer to cross errors assigned and argued which is not contained and argued in appellant's original brief. Counsel for appellee may within ten days after service upon him of appellant's answer to cross errors assigned and argued in appellee's brief file a reply brief thereto but such reply brief shall be limited to answering the matters set up in answer to such cross errors argued. Thereafter, no briefs may be filed except with consent of the court, or a justice thereof, upon written petition therefor. Upon written application served upon opposing counsel, the court or a justice thereof, for good cause shown, may extend the time for the filing of any of appellant's or appellee's briefs for not exceeding fifteen days.

The Clerk of this court shall notify the attorneys of record of the date of filing the transcript in his office. Five copies of briefs prepared and served as required by rules on those subjects, shall be filed with the Clerk of this court, except that nine copies shall be filed with the Clerk in disbarment cases and cases where this court grants a writ of certiorari to either of the Court of Appeals." At page 231, Volume 3, 1969 Cumulative Pocket Part, Code of Alabama, Recompiled.

These revised rules of practicing in the Supreme Court became effective June 1, 1955 and one of the first cases decided by the Supreme Court of Alabama concerning this rule was **Tipton v. Tipton**, 267 Ala. 64, 100 S.2d 14 (October 31, 1957). In that case, the Court stated as follows:

"The word 'shall' is used both for setting the time when appellant shall file his brief and also for setting

out the penalty for failure to file appellant's brief as required. Under the mandatory requirements of Rule 12, this court is required to grant the motion to dismiss or in the alternative, to read the word 'thirty' as it appears in the rule to be the word 'thirty-one.' This we do not have authority to do." At page 15, 100 S.2d.

In that case, the appellant's brief was filed not within thirty days after the transcript had been filed in that court but within thirty-one days after said transcript had been so filed. In that case, there had been no extension of time for filing of the brief as there was in the instant case which is the only difference between that case and petitioner's cases. Petitioner here had been granted an extension of time of fifteen days as allowed under the rules and therefore, appellant's briefs in the case below were due under the rule within forty-five days after the filing of the transcripts in each case on October 6, 1971. This forty-five days expired on November 20, 1971, that date being on a Saturday, the last date for the filing of appellant's briefs was November 22, 1971. Under Rule 46 for computing time, "the last day of the period so computed is to be included unless it is a Saturday, Sunday or legal holiday in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday." At page 255, Volume 3, 1969 Cumulative Supplement, Code of Alabama 1940, Recompiled 1958. In the instant cases, appellant's briefs as consolidated were not filed until November 23, 1971, one day subsequent to the time which same were due to be filed.

In the **Tipton** case, supra, the Court also stated:

"The decision of appeals on the merits is much to be desired. Where, however, as in this case, appellants have not complied with the mandatory requirements governing appeals, on motion to dismiss filed by ap-

pellees, no course of decision is open to this court other than to follow and enforce the pertinent rule." at pages 15, 16, 100 S.2d.

Whereupon, the appellee filed a motion to dismiss the appeal of appellant or to affirm the judgment in each of the subject cases on December 1, 1971 and as a principal ground therefor stated as follows:

"1. For the consolidated brief of appellant heretofore filed on November 23, 1971 was not filed in accordance with Rule 12, Revised Rules of the Supreme Court of Alabama, Title 7, Code of Alabama 1940, Recompiled 1958, Page 1164, as amended, in that it was not filed within the time for filing the brief of appellant as extended by order of the court after the transcripts of the records were filed in this court on October 6, 1971 which time expired on November 20, 1971, that date being on a Saturday, the last date for filing the appellant's brief was November 22, 1971." (Page 26A, Appendix G to the Petition for Certiorari.)

This Court Should Not Entertain Certiorari in This Case.

The Supreme Court of Alabama and the Court of Criminal Appeals of Alabama have consistently since Rule 12 became effective strictly adhered to this rule. The opinions of the Supreme Court of Alabama wherein appeals have been dismissed because briefs were not filed on time are numerous. The following is a list of same: **Dwight Employees Association v. Southern**, 264 Ala. 695, 85 S.2d 906; **Hogan v. Farmers and Ginners Cotton Oil Company**, 264 Ala. 697, 85 S.2d 906; **Gamble v. Lapley**, 265 Ala. 695, 90 S.2d 926; **Miller v. Wood**, 265 Ala. 698, 90 S.2d 927; **Ex Parte NAACP**, 268 Ala. 504, 109 S.2d 140; **Waterall v. Waterall**, 268 Ala. 594, 109 S.2d 675; **Modlin v. Modlin**, 268 Ala. 618, 109 S.2d 716; **Black v. State**, 269 Ala. 269, 112 S.2d 792; **Board of Commissioners of City of Mont-**

gomery v. Crenshaw, 270 Ala. 598, 120 S.2d 870; **Page v. State**, 273 Ala. 227, 137 S.2d 740; **Moore v. Moore**, 279 Ala. 122, 182 S.2d 855; **Domit Construction Company v. Town of Mountain Woods**, 279 Ala. 409, 186 S.2d 124.

There are numerous other opinions of the Supreme Court of Alabama wherein petitions for certiorari to the Court of Appeals of Alabama were stricken because such petitions failed to comply with other rules but in such cases, appeals were denied for failure to comply with the rules. This has been done in other states as well as Alabama and even in the federal district courts and the United States Supreme Court on numerous occasions. This court has held that the law of practice of a state must be complied with in order to properly bring constitutional questions to this court. An orderly method for judicial review of this court could reasonably require no less. **John v. Paulin**, 231 U.S. 583, 34 S.Ct. 178, 179, 58 L.Ed. 381. In that case, this court said:

> "Without any doubt, it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law. Callan v. Bransford, 139 U.S. 197, 35 L.Ed. 144, 11 S.Ct.Rpt. 519; Brown v. Massachusetts, 144 U.S. 573, 36 L.Ed. 546, 12 S.Ct.Rpt. 757; Jacobi v. Alabama, 187 U.S. 133, 47 L.Ed. 106, 23 S.Ct.Rpt. 48; Hulbert v. Chicago, 202 U.S. 275, 281, 50 L.Ed. 1026, 1028, 26 S.Ct.Rpt. 617; Newman v. Gates, 204 U.S. 89, 51 L.Ed. 385, 227 S.Ct.Rpt. 220; Chesapeake and O.R. Company v. McDonald, 214 U.S. 191, 195, 53 L.Ed. 963, 965, 29 S.Ct.Rpt. 546." at pages 178, 179, 34 S.Ct.

This court also stated in **U. S. v. Robinson**, 361 U.S. 220, 80 S.Ct. 282, whereupon the government's motion to dismiss an appeal for want of jurisdiction because notices of appeal were not filed within ten days after entry of judgment and where the Court of Appeals for the District of Columbia, 104 U.S.App. D.C. 200, 260 F.2d 718, remanded for supplementation of record for determination whether the district court was satisfied that failure to act within ten days resulted from excusable neglect, but held that if the district court was so satisfied, the Court of Appeals would have jurisdiction of the appeal. After the district court had ordered the record to reflect that appeals were allowed and that failure to act was due to excusable neglect, the Court of Appeals then denied the government's petition for rehearing and the government brought certiorari to the United States Supreme Court. This court held in reversing the Court of Appeals regarding its holding pertaining to Rule 45B, Federal Rules of Criminal Procedure, 18 USCA, as follows:

> "That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision. U. S. v. Isthmian S.S. Company, 359 U.S. 314, 79 S.Ct. 857, 3 L.Ed.2d 845. If, by that process, the courts are ever given power to extend the time for the filing of a notice of appeal upon a finding of excusable neglect, it seems reasonable to think that some definite limitation upon the time within which they may do so would be prescribed; for otherwise, as under the decisions of the court below, many appeals might—almost surely would—be indefinitely delayed. Certainly that possi-

bility would unnecessarily produce intolerable uncertainty and confusion. Whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it." at p. 288, 289, 80 S.Ct.

There this court held that the rule setting the time for the filing of a notice of appeal within a ten day period and a rule providing that the court may not enlarge such period for taking an appeal was a mandatory and jurisdictional requirement and had to be complied with in order to perfect an appeal. We see no distinction in the court's upholding that rule and the Alabama courts upholding its own rules for effecting an appeal. It has long been settled that where a federal question is not properly presented to the state appellate court of last resort, and for this reason, under state practice, is not decided or passed upon by such court of last resort, the question is not before the Supreme Court on certiorari to the state court. **Barber v. State of Georgia**, 249 U.S. 454, 39 S.Ct. 316, 317; **Louisville & Nashville Railroad Company v. Woodford**, 234 U.S. 46, 34 S.Ct. 739, 741; **Taylor v. City of Birmingham**, 35 Ala.App. 135, 45 S.2d 53, Cert.Den. 253 Ala. 369, 45 S.2d 60, Cert.Den. 340 U.S. 382, 71 S.Ct. 45; **Michael v. State of Louisiana**, 340 U.S. 832, 71 S.Ct. 45. This court has denied certiorari in cases where an order was rendered dismissing an appeal from a state appellate court for failure to comply with state court rules of procedure without regard to the federal constitutional questions. **Shuttlesworth v. Bham.**, 272 Ala. 708, 130 S.2d 236, Cert.Den. 368 U.S. 959, 82 S.Ct. 403, 7 L.Ed. 2d 390; **Phifer v. City of Birmingham**, 202 Ala. 908, 130 S.2d 237, Cert.Den. 368 U.S. 959, 82 S.Ct. 407, 7 L.Ed.2d 390. In **White v. City of Birmingham**, 272 Ala. 146, 130 S.2d 231, Cert.Den. 130 S.2d 234, the Supreme Court of Alabama denied certiorari to the Court of Appeals of Alabama which had struck a transcript of evidence and

affirmed a judgment below due to the fact that the transcript had not been filed within sixty days after the date of taking an appeal and that such failure to do so was fatal to the appeal. The **White** case was cited by the Supreme Court of Alabama as authority for its refusal to review those cases which were in due course denied certiorari by this court. While we recognize that the denial of writ of certiorari imports no expression of opinion on the merits of the case and carries with it no implication whatever regarding the Supreme Court's views on the merits of the case or no support of the lower court decision nor of any of the views in the opinion supporting it, it is clear that fewer than four members of the court there in denying certiorari deemed it a case worthy of review and in so doing exercised sound judicial discretion. We take that as being persuasive of the correctness of the decisions rendered in those two cases. Since the failure to review this instant case was based upon a not dissimilar ground which is a non-federal ground independent of the federal questions involved in the cases below, the judgment or decree of dismissal in these cases should not be reviewed in the Supreme Court. The decisions of dismissal in these cases was based solely upon a point of local and general law which is sufficient to support the judgments and leaves therefore nothing for the Supreme Court to review. There can be no novelty involved in these instant cases as was in **NAACP v. Alabama**, 377 U.S. 288, and **NAACP v. Alabama**, 357 U.S. 449, wherein this court did not allow Alabama procedural rules to prevail. That disallowance was based upon a holding that the rules there involved had been complied with substantially, in lieu of failing to comply at all as was done in these instances. Such a failure to comply has been strictly and regularly held by the Alabama Supreme Court to be fatal to an appeal and the same holding was indiscriminately applied in all of these cases in accord-

ance with such strict and regular applications of the rule. This regular application of the rule is indicated in all of the cases cited hereinabove where Rule 12 was stated to be a mandatory requirement.

This use of the Rule then indicates that the case cited by petitioner, **Henry v. Mississippi**, 379 U.S. 433, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965), is not applicable in the determination of this petition. It is clear that a ruling requiring contemporaneous objection to the introduction of legal evidence during a trial might not serve a legitimate state interest, according to its application in a given case, whereas a rule uniformly applied requiring filing of a brief on time in perfecting an appeal does serve a legitimate state interest. This is so because in the first instance, as the court pointed out, there is ample opportunity for the court to be flexible, but as in the instant case, where a brief was not filed within the time prescribed for perfecting an appeal, the court cannot be so flexible and must enforce its rule relating to the time and filing of briefs in the legitimate state interest of preventing undue delay and uniformity in the submission of cases. This is substantially the same interest that the United States had in establishing its rules as was involved in the **U. S. v. Robinson**, supra, case. In **Parker v. People of State of Illinois**, 333 U.S. 565, 68 S.Ct. 708, this court stated regarding Illinois law that it was well settled law in Illinois that if an appellant takes his case to the appellate court where errors are assigned of which that court has jurisdiction, he is deemed to have waived any constitutional questions. And this court went on to state that it had held in the former case, **Central Union Telephone Company v. City of Edwardsville**, 269 U.S. 190, 46 S.Ct. 90, 70 L.Ed. 229, that federal constitutional questions which Illinois held had been waived for failure to follow its procedure and would not be entertained here. The court in **Parker v. Illinois**, supra, granted certiorari

simply to determine whether the rule of the **Edwardsville** case was applicable to the circumstances presented in the **Parker** case and said:

> "The court said in the Edwardsville case that when the waiver is founded on a failure to comply with the appellate practice of a state the questions turns on whether that practice gives litigates 'a reasonable opportunity to have the issue as to the claimed right, heard and determined' by the state court. 269 U.S. pages 194, 195, 46 S.Ct. at page 91, 70 L.Ed. 229. It was there held that the Illinois practice of requiring constitutional questions to be taken directly to the Illinois Supreme Court and of refusing to review them if review was first sought in the appellate court satisfied the requirement. We adhere to that decision." at page 710, 68 S.Ct.

Then in **Wolfe v. State of North Carolina**, 364 U.S. 177, 80 S.Ct. 1482, 4 L.Ed.2d 1650, this court dismissed an appeal where the North Carolina Supreme Court affirmed a judgment of conviction without considering a federal question in accordance with requirements of rules of state procedural law. This court said there:

> "Examination of the whole course of North Carolina decisions thus precludes the inference that the Supreme Court of North Carolina in this case arbitrarily denied the appellants an opportunity to present their federal claim. The judgment before us for review is the judgment which the Supreme Court of North Carolina made on the record before it, not the action of the state trial court, 'without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are

in controversy than when the case turns entirely upon questions of local or general law. Callan v. Bransford, 139 U.S. 197, 11 S.Ct. 519, 35 L.Ed. 144; Brown v. Commonwealth of Massachusetts, 144 U.S. 573, 12 S.Ct. 757, 36 L.Ed. 546; Jacobi v. State of Alabama, 187 U.S. 133, 23 S.Ct. 48, 47 L.Ed. 106; Hulbert v. City of Chicago, 202 U.S. 275, 281, 26 S.Ct. 617, 618, 50 L.Ed. 1026; Newman v. Gates, 204 U.S. 89, 27 S.Ct. 220, 51 L.Ed. 385; Chesapeake and Ohio Railroad Company v. McDonald, 214 U.S. 191, 195, 29 S.Ct. 546, 548, 53 L.Ed. 963', John v. Paullin, 231 U.S. 583, 585, 34 S.Ct. 178, 58 L.Ed. 381. 'When as here there can be no pretence that the (state) court adopted its view in order to evade a constitutional issue and the case has been decided upon grounds which have no relation to any federal question, this court accepts the decision whether right or wrong.' Nichol v. Cole, 256 U.S. 222, 225, 41 S.Ct. 467, 468, 65 L.Ed. 900." At page 1491, 1492, 80 S.Ct.

Therefore, we think it is clear that the appellant in this case failed to comply with state appellate procedures, namely, Rule 12 of the Supreme Court Rules, when he had a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court by simply complying with the rule and the court's determination that he had failed to do so and that such failure warranted the dismissal was based upon an adequate and independent non-federal ground. Such decision was rendered under no pretence of an attempt to evade a constitutional issue and was on a ground that had no relation to any federal question involved. Such a dismissal under Rule 12 had been strictly, consistently and regularly invoked on numerous occasions indiscriminately and was not a novel or discriminate action.

II

The Petition for Certiorari Should Be Denied for the Dismissal of These Cases Was Based Upon a Rule Which Clearly Serves a Legitimate State Interest.

The Supreme Court of Alabama said in **State v. Laidlaw**, 268 Ala. 92, 105 S.2d 63, as follows:

> "One of the obvious purposes of this rule is to provide a time schedule for filing briefs to the end that a case may be submitted without undue delay. Another objective, implicit in the rule, is to aid this court in its consideration of a case." At page 66, 105 S.2d.

The holding then that such a rule as Rule 12 requiring appellant's brief to be filed within thirty days in perfecting his appeal must be held to serve a legitimate state interest for the timely perfection of an appeal even under federal rules is well recognized as being mandatory. The time of thirty days, with the possible extension for fifteen days **more**, gives the appellant ample time or reasonable time in which to present his appeal. Failure to comply therewith on the part of an appellant who is represented by competent counsel should not give rise to a claim by him that the failure to consider the case under this rule by the appellate court is an attempt to prevent vindication of his federal rights or to evade determination of the federal questions raised below. The state interest served by the rule is pointed out above and since it was the responsibility of the appellant to file his brief within the time prescribed by the rule, he should not be allowed to come in at any time thereafter and claim that his failure to comply with said rule prevents a vindication of his rights. To allow such would not serve any legitimate state interest or federal interest as there may as well be no rule in regards to the time for perfecting an appeal

since the same claim could be made regardless of the number of days late the appellant was in either giving notice of appeal, filing his transcript or filing his briefs in perfecting same. The state has a legitimate interest in preventing such erratic, irregular and uncertain procedures.

This court in **Barr v. City of Columbia,** 378 U.S. 146, 149, said:

> "We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review."

Therefore, since the rule in this case was not shown to have been applied in some other manner than a strict and regular consistent one then this court should not review it. The court indicated in the **Barr** case that a strict, regular and consistent application of a procedural requirement by a state would be a legitimate state interest. It would then be apparent that in order for the petitioner here to be vindicated for his procedural default that he would need to show that the state's interest in orderly procedure would not be frustrated as a result thereof.

In the **Henry v. Mississippi case**, cited by petitioner, this court held that the rule therein involved requiring contemporary objection to the introduction of illegal evidence generally served a legitimate state interest, but found that in the particular instance in that case, it was not justified as frustrating the state's interest in orderly procedure. In **Douglas v. Alabama,** 380 U.S. 415, 85 S.Ct. 1674, this court held that a legitimate state interest was served by requiring objection to alleged federal error in time for the trial court to take appropriate corrective action. Surely therefore, the requiring, as a state procedural matter, that a brief be filed within thirty days after filing a transcript serves nothing but a legitimate state interest in orderly procedure and thus prevents erratic and undue delays. It

must be pointed out here that in this particular case, the convictions involved were rendered on May 13, 1971 by the trial court and thereafter upon appeal the trial court granted an extension of time of thirty days to file the transcript. Upon expiration of the time for filing the transcript as extended by the trial court, the appellant obtained an additional extension by order of the Court of Criminal Appeals to August 13, 1971, and then again obtained an extension to September 10, 1971, and obtained a third extension from that court to October 8, 1971 when the transcripts were finally filed on October 6, 1971. There was also thereafter an extension of time granted for the filing of appellant's brief from thirty to forty-five days and the appellant eventually filed said briefs one day too late notwithstanding all of the aforegoing extensions of time. Therefore, regardless of the reasons for the said extensions, it cannot be said that the appellant in these cases did not have reasonable time to comply with the requirements of the rule. These delays are indicative of the legitimate state interest served by the enforcement of Rule 12.

III

Certiorari Should Be Denied in These Cases for There Is No Constitutionally Guaranteed Right to Engage in the Commercial Sale and Distribution of Obscene Materials Even in the Absence of Pandering, Sale to Minors, or Invasion of Privacy of Others as Matter Determined to Be Legally Obscene Is Without the Protection of the First and Fourteenth Amendments of the United States Constitution.

That obscene matter legally determined to be so is not protected by the First and Fourteenth Amendments to the United States Constitution has been well settled as a matter of law by this court and there is no need to spend a lot of time explaining the cases so holding. Ever since **Roth v. U. S.**, 354 U.S. 476 (1957) this court has consistently said that there is such a thing as obscenity. This

principle was reiterated in two recent cases, **U. S. v. 37 Photographs**, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 and **U. S. v. Reidel**, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813.

In the former case, this court prohibited the importation of obscene materials into the United States and in the latter case, held that there was no absolute right to exhibit obscene material under any circumstances to the public.

The job of determining obscenity lies with the courts. In the case of **Jacobellis v. Ohio**, 378 U.S. 184, this court said:

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See Roth v. U. S., supra, 354 U.S. 497, 498, 77 S.Ct. 1315, 1316 (separate opinion). Such an issue, we think, must ultimately be decided by this court. Our duty admits of no 'substitute for facing up to the tough, individual problems of constitutional judgment involved in every obscenity case.'" at page 188.

And in the same case, the court further said:

> "Hence, we reaffirmed the principle that in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." at page 190.

Then this court held in March, 1966 in **Ginzburg v. U. S.**, 383 U.S. 463, that:

> "In the cases in which this court has decided obscenity questions since **Roth**, it has regarded the

materials as sufficient in themselves for the determination of the question." at page 465.

Therefore, as we read those cases it is felt that the method of testing an obscenity conviction is well stated and established by this court in all of its opinions. It would therefore be incongruous to say that sexually oriented materials such as magazines and movie films sold and exhibited commercially either in a bookstore or a commercial theatre is protected constitutionally notwithstanding the fact that there can be no exposure of the material to juveniles or unwilling adults in an obtrusive manner, or in the absence of pandering. This is so for the simple reason that the seller or exhibitor has no constitutional right to sell obscene materials or exhibit them commercially. This does not involve the right of an individual to merely possess such material in the privacy of his own home, but simply means that there is no corresponding right of another individaul to commercially distribute obscenity. If it is obscene legally and is prohibited by the state and local laws, then such commercial distribution would be impermissible under the cases since Roth, including the **U. S. v. 37 Photographs**, supra, case, and **U. S. v. Reidel**, supra. The abolishment of such laws or the limiting of same to the extent that such would be permissible is a matter for the legislatures or governing bodies to decide. If such laws prescribing obscenity are constitutional as this court has time and again held them so to be, it should not now be said that such laws do not apply to commercial distribution or exhibition of such material if there are no juveniles involved, there is no intrusion upon the public and there is no pandering. Such is not constitutionally permissible if obscenity as legally defined is not protected by the First and Fourteenth Amendments to the United States Constitution. This has been reaffirmed and reiterated by this court time and time again.

CONCLUSION

Respectfully, this respondent states that the question of obscenity vel non was resolved properly in the courts below; that no constitutional rights have been denied to the petitioner by enforcement of the state court procedural rule in these cases upon an adequate non-federal ground and that enforcement of the rule involved is a legitimate state interest. For these reasons, certiorari here should be denied.

Respectfully submitted

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